

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

KELLY ROYCE KEY,

Defendant-Appellant.

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UNPUBLISHED

June 5, 2014

No. 313756

Wayne Circuit Court

LC No. 11005864-FH

Before: RIORDAN, P.J., and DONOFRIO and FORT HOOD, JJ.

PER CURIAM.

Defendant, Kelly Royce Key, appeals as of right his jury trial conviction of arson of a dwelling house, MCL 750.72. Defendant was sentenced from 38 months to 20 years' imprisonment. We affirm.

**I. FACTUAL BACKGROUND**

On May 19, 2011, an alarm company notified Johnane Reynolds—defendant's then-wife—that the alarm at her townhouse had been set off. While she informed the alarm company that sometimes defendant was slow to put in the numbers, the alarm company called her back minutes later and indicated that the fire alarm was going off. The fire department was called and they extinguished the fire.

An expert in arson investigation arrived at the scene and observed a burned area under the front window, and that all four burners on the stove were turned on. He found burning papers under the window and on the stove. He also found a burned plant under the window, and paper that burned in the bathroom. The expert concluded that the fire had been intentionally set, as he ruled out gas or electric as the cause.

The detective in charge of the case interviewed defendant on June 2, 2011. During the interview, defendant admitted to starting the fire when he turned on the stove while paper was on top. Defendant also confessed to dropping a piece of paper next to the front door. However, at trial, defendant denied any knowledge of how the fire was started, and claimed that he made the admissions to the police because he was distraught.

The jury found defendant guilty of arson of a dwelling house. At sentencing, while defense counsel agreed that the prior record variables (PRVs) were properly scored at 10 points,

defendant argued that he only had one prior misdemeanor in the last 10 years, so he should receive only two points under PRV 5. The trial court disagreed, and defendant subsequently filed a motion for resentencing. Defendant contended that there were more than 10 years between his current conviction and prior misdemeanors, so PRV 5 only should be scored at two points.

While the trial court agreed that defendant's prior traffic violations could not be counted under PRV 5, the court ultimately agreed with the prosecution that those convictions could be considered for the 10-year gap rule. Defendant was sentenced to 38 months to 20 years' imprisonment. Defendant now appeals.

## II. SENTENCING

### A. STANDARD OF REVIEW

Defendant contends the trial court's scoring of PRV 5 runs afoul of the 10-year gap rule because there was more than 10 years between his 2008 domestic violence conviction and his 1993 embezzlement conviction without counting his traffic violations. We review a trial court's factual findings during sentencing, which must be supported by a preponderance of the evidence, for clear error. *People v Hardy*, 494 Mich 430, 438; 835 NW2d 340 (2013). "Clear error exists if the reviewing court is left with a definite and firm conviction that a mistake has been made." *People v Johnson*, 466 Mich 491, 497-498; 647 NW2d 480 (2002). "Whether the facts, as found, are adequate to satisfy the scoring conditions prescribed by statute, i.e., the application of the facts to the law, is a question of statutory interpretation, which an appellate court reviews de novo." *Hardy*, 494 Mich at 438.

In construing statutes, we apply a reasonable construction of the statute, enforce clear statutory language as written, and reconcile any apparent inconsistencies if possible. *People v Bulger*, 291 Mich App 1, 5; 804 NW2d 341 (2010). "In construing a statute, the statutory provisions must be read in the context of the entire statute in order to produce a harmonious whole; courts must avoid a construction that would render statutory language nugatory." *People v McLaughlin*, 258 Mich App 635, 673; 672 NW2d 860 (2003).

### B. ANALYSIS

Pursuant to MCL 777.55(1)(c), PRV 5 is scored at 10 points when "[t]he offender has 3 or 4 prior misdemeanor convictions or prior misdemeanor juvenile adjudications." In contrast, only two points should be awarded when "[t]he offender has 1 prior misdemeanor conviction or prior misdemeanor juvenile adjudication." MCL 777.55(1)(e). The statute instructs the court to "count a prior misdemeanor conviction or prior misdemeanor juvenile adjudication only if it is an offense against a person or property, a controlled substance offense, or a weapon offense." MCL 777.55(2)(a).

MCL 777.50, which constitutes the 10-year gap rule, provides:

(1) In scoring prior record variables 1 to 5, do not use any conviction or juvenile adjudication that precedes a period of 10 or more years between the discharge

date from a conviction or juvenile adjudication and the defendant's commission of the next offense resulting in a conviction or juvenile adjudication.

(2) Apply subsection (1) by determining the time between the discharge date for the prior conviction or juvenile adjudication most recently preceding the commission date of the sentencing offense. If it is 10 or more years, do not use that prior conviction or juvenile adjudication and any earlier conviction or juvenile adjudication in scoring prior record variables. If it is less than 10 years, use that prior conviction or juvenile adjudication in scoring prior record variables and determine the time between the commission date of that prior conviction and the discharge date of the next earlier prior conviction or juvenile adjudication. If that period is 10 or more years, do not use that prior conviction or juvenile adjudication and any earlier conviction or juvenile adjudication in scoring prior record variables. If it is less than 10 years, use that prior conviction or juvenile adjudication in scoring prior record variables and repeat this determination for each remaining prior conviction or juvenile adjudication until a period of 10 or more years is found or no prior convictions or juvenile adjudications remain.

In the instant case, a review of defendant's extensive criminal record reveals that he was unable to maintain a 10-year period without convictions. Beginning in 1993, defendant was convicted of second-degree retail fraud, and attempted larceny under \$100. Also in 1993, he was convicted of embezzlement, with a discharge date in January of 1994. In 1998, he was convicted of no valid license in his possession. Then, in 2005, he was convicted of operating without a license. In 2009, he was convicted of domestic violence relating to an incident in 2008. Finally, the current sentencing offense occurred on May 19, 2011.

Thus, a review of defendant's extensive criminal record reveals no 10-year gap between his convictions, consistent with MCL 777.50. Although defendant's traffic misdemeanors cannot themselves be scored under PRV 5, that is not a requirement for calculating the 10-year period under MCL 777.50. As this Court has recognized, when interpreting MCL 777.50, "the issue is not whether 10 years had passed between the discharge from [the defendant's previous offense] and the present offense[.]" *People v Billings*, 283 Mich App 538, 552; 770 NW2d 893 (2009). Rather, the issue is "whether, starting with the present offense, there was ever a gap of 10 or more years between a discharge date and a subsequent commission date that would cut off the remainder of [the defendant's] prior convictions or juvenile adjudications." *Id.* In other words, the purpose of the 10-year gap rule is to determine whether a defendant has managed to go crime-free for period of 10 years, and if so, to exclude any convictions before that period. Defendant has not managed such a 10-year period.

We have concluded this before, albeit in the context of the former judicial sentencing guidelines. In *People v Reyna*, 184 Mich App 626, 632; 459 NW2d 75 (1990), this Court stated:

[W]e do not believe that a conviction for purposes of determining the applicability of the ten-year rule need be a conviction for an offense which may be scored under the guidelines. Rather, we hold that any criminal conviction is sufficient to establish that the defendant did not have a ten-year period free of convictions. . . . We believe that the emphasis under the ten-year rule is not on

what offense was committed, but whether the defendant was able to be completely conviction-free for a period of at least ten years.

This interpretation also is supported by the Michigan Sentencing Guidelines Manual (2013 ed.), p 3, which provides:

Apply the “10-year gap rule” by determining the length of time between the discharge date of the offender’s conviction or juvenile adjudication immediately preceding the commission date of the sentencing offense. If the time span is 10 years or more, that conviction or juvenile adjudication—and any convictions or adjudications that occurred earlier—must not be counted when scoring the offender’s PRVs. If the time span between the commission date of the offender’s sentencing offense and the discharge date of the offender’s most recent conviction or adjudication is less than 10 years, that prior conviction or adjudication must be counted in scoring the offender’s PRVs.

If the offender’s most recent conviction or adjudication must be counted in scoring his or her PRVs, and if the offender has additional prior convictions or juvenile adjudications, determine the length of time between the commission date of the prior conviction or adjudication first scored and the discharge date of the next earlier conviction or adjudication. If the time span equals or exceeds 10 years, that conviction or adjudication may not be counted. If the time span is less than 10 years, that conviction or adjudication may be counted in scoring the offender’s PRVs. Use the process described above until a time span equal to or greater than 10 years separates the discharge date of an earlier conviction or adjudication from the commission date of the next conviction or adjudication or until no previous convictions or adjudications remain.

The language “may be counted” suggests that prior convictions that fall within the 10-year gap rule may not necessarily be counted in scoring the specific PRVs. Moreover, contrary to defendant’s assertions on appeal, his prior traffic offense convictions are not enhancing his sentence. He is not receiving any additional points for those convictions. Rather, as the prosecution argued below, the fact that defendant could not manage a 10-year period without committing a crime enhances his sentence.

### III. CONCLUSION

Defendant has not established any errors that warrant resentencing. We affirm.

/s/ Michael J. Riordan  
/s/ Pat M. Donofrio  
/s/ Karen M. Fort Hood